Trading our Rights for Internet Access

By Paul Engel

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- Can Congress delegate taxing powers to an executive agency?
- They told the FCC they could collect money from telecommunications companies to provide “universal service”.
- The FCC sets “collections” to fund this “Universal Service Fund”.

Benjamin Franklin wrote “They who would give up an essential liberty for temporary security, deserve neither liberty or security.” What does it say about the American people who seem willing to give up their right to control their government in exchange for Internet access?

The case in question is Federal Communications Commission et al. v. Consumers’ Research et al. and it questions if Congress unconstitutionally delegated their power to a third party.

Background

To understand the situation, we need to go back to the creation of the FCC.

The Communications Act of 1934 established the Federal Communications Commission (FCC or Commission) and instructed it to make available to “all the people of the United States,” reliable communications services “at reasonable charges.”

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Look all you want, you will not find the power to insure people have reliable communication services at any price. No, the "General Welfare" clause doesn't cover it.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;

U.S. Constitution, Article I, Section 8, Clause 1

So the General Welfare Clause only allows Congress to collect taxes, not provide services. And Congress can only collect taxes for three purposes: Paying the debts, the common defense, and general welfare of the United States. Capital "U," capital "S," as in a proper noun. This law was not for the general welfare of the United States though, but for certain people, mostly rural and the poor.

The problems with this legislation goes on.

The universal-service project arose from the concern that pure market mechanisms would leave some population segments—such as the poor and those in rural areas—without access to needed communications services. Under the 1934 Act, the FCC pursued universal service primarily through implicit subsidies, using its rate-regulation authority to lower costs for some consumers at the expense of others.

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Congress was concerned that the market would leave some population segments without communications services. Except it's not Congress' business to make sure everyone gets the services Congressmen think they should. That means the Communications Act of 1934 is an unconstitutional act, and

therefore void.

An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed.

Norton v. Shelby County :: 118 U.S. 425 (1886)

Furthermore, Congress claimed to give the FCC the power to regulate telecommunications rates, and to use them to subsidize communications for their special interest groups. Then, in 1996, Congress upped the criminality of their act.

In 1996, Congress amended the Act and created a new framework for achieving universal service. Section 254 of the amended statute requires every carrier providing interstate telecommunications services to "contribute" to a fund, known as the Universal Service Fund.

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Now Congress is requiring a "tax" on interstate telecom providers. They may call it a contribution, but that's the same trick the mafia uses for their protection rackets. So now Congress is telling the FCC to extort money from telecommunications providers, and what to use it for. Guess who actually pays for this alleged "contribution?" We the People, in our phone and internet bills.

The FCC must use the money in the Fund to pay for universal-service subsidy programs. … The statute designates the beneficiaries of universal-service subsidies—low-income consumers, those in rural areas, schools and libraries, and rural hospitals.

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So Congress tells the FCC to collect this illegal tax, then to spend it for something Congress is not authorized to spend money on. Things keep getting worse.

Section 254 also sets forth "principles" on which the FCC "shall base" its universal-service policies. §254(b). Among other things, those principles direct that all consumers, "including low-income consumers" and those in "rural" areas, should have access to quality services at affordable prices.

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Again, providing communications services is not a power vested in the government of the United States, so Congress had no constitutional authority to write such law. And if that weren't bad enough, the terms "quality services" and "affordable prices" are not defined; it's up to the FCC bureaucracy to decide.

The FCC has appointed the Universal Service Administrative Company, a private, not-for-profit corporation, as the Fund's "permanent Administrator."

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As if that weren't bad enough, the FCC hires a private company to administer this extorted funding. Which brings us to the case itself.

Decision

The case that came up before the Supreme Court comes on appeal of a Fifth Circuit case.

Consumers' Research petitioned for review in the Fifth Circuit, contending that the universal-service contribution scheme violates the nondelegation doctrine. The en banc court granted the petition, replacing a panel decision to the

contrary.

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Once again we have a case based not in a violation of the law, but of court precedent. Consumer's Research did not claim that this scam violated the law, but the court's "non delegation doctrine."

In the Federal Government of the United States, the nondelegation doctrine is the theory that the Congress of the United States, being vested with "all legislative powers" by Article One, Section 1 of the United States Constitution, cannot delegate that power to anyone else. However, the Supreme Court ruled in J. W. Hampton, Jr. & Co. v. United States (1928) that congressional delegation of legislative authority is an implied power of Congress that is constitutional so long as Congress provides an "intelligible principle" to guide the executive branch

Nondelegation Doctrine – The Free Legal Dictionary

The problem is that the Constitution doesn't deal with "implied powers," but with vested powers. As the Necessary and Proper Clause states:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Constitution, Article I, Section 8, Clause 18

Since the Constitution vests Congress with the power to lay and collect taxes, this delegation of the power seems to violate the Necessary and Proper Clause.

In the full Fifth Circuit's view, the combination of Congress's delegation to the FCC and the FCC's "subdelegation"

to the Administrator violated the Constitution, even if neither delegation did so independently.

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So if the Fifth Circuit found this scheme violated the Constitution, what was it based on?

(a) Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." §1. Accompanying that assignment of power to Congress is a bar on its further delegation. At the same time, this Court has recognized that Congress may "seek[] assistance" from its coordinate branches and "vest[] discretion" in executive agencies to implement the laws it has enacted.

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To some extent, this position is correct. Congress lays the taxes, but the IRS handles the collection. However, there is nothing in the Constitution that allows Congress to delegate lawmaking powers to the executive branch, much less those powers be eventually delegated to a private company.

Concurrence

In addition to joining the opinion, Justice Kavanaugh wrote a concurrence which Justice Jackson joined.

This case presents a narrow but important nondelegation question: May Congress authorize the Federal Communications Commission to determine the monetary amount "sufficient" to fund certain telecommunications services, which in turn is the amount that telecommunications carriers must contribute to the Universal Service Fund? Applying the longstanding "intelligible principle" test set forth by this Court's

precedents, the Court today upholds that congressional delegation to the FCC. See Skinner v. Mid-America Pipeline Co.

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Can Congress authorize the FCC to lay taxes? To me that's an obvious no. Can the FCC then delegate the administration of those funds to a third-party? That would be a hard no.

I join the Court's opinion and write separately to make two points. First, I will briefly outline what I understand to be the background and rationale behind the intelligible principle test that the Court has long used to assess congressional delegations of authority to the Executive Branch.

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Justice Kavanaugh wants to dig into the "intelligible principle" test regarding delegation of authority. That's fine. He also makes a point about the delegation to private entities.

Second, I will explain why congressional delegations to independent agencies—as distinct from delegations to the President and executive agencies—raise substantial questions under Article II of the Constitution.

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Kavanaugh's second point involves the delegation of power to "independent agencies," but Kavanaugh only appears to see an Article II problem.

Rather, the problems with delegations to "unaccountable" officials primarily arise from delegations to independent agencies. Independent agencies are headed by officers who are not removable at will by the President and who thus operate

largely independent of Presidential supervision and direction. Those independent agency heads are not elected by the people and are not accountable to the people for their policy decisions. Unlike executive agencies supervised and directed by the President, independent agencies sit uncomfortably at the outer periphery of the Executive Branch. Although this Court has thus far allowed such agencies in certain circumstances, they belong to what has been aptly labeled a "headless Fourth Branch."

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Kavanaugh's problem with these "independent agencies" is the fact that they don't directly report to the President. That fact alone has constitutional issues. Congress is not authorized to create agencies outside of federal oversight. If they do not operate under the Executive Branch, where does their oversight come from?

Dissent

Justice Gorsuch filed a dissenting opinion, joined by Justices Thomas and Alito.

Within the federal government, Congress "alone has access to the pockets of the people." The Federalist No. 48, p. 334 (J. Cooke ed. 1961) (J. Madison). The Constitution affords only our elected representatives the power to decide which taxes the government can collect and at what rates. See Art. I, §8, cl. 1. Throughout the Nation's history, Congress has almost invariably respected this assignment. As this Court observed some decades ago, it would represent "a sharp break with our traditions" for Congress to abdicate its responsibilities and "besto[w] on a federal agency the taxing power."

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OK, Justice Gorsuch seems to be making a similar point. Congress, and only Congress, has the power to determine what taxes to collect. Even the Supreme Court recognized that giving a federal agency taxing power would be a break, although Gorsuch claimed it would be a break from tradition, not the law.

Today, the Court departs from these time-honored rules. When it comes to "universal service" taxes, the Court concludes, an executive agency may decide for itself what rates to apply and how much to collect. In upholding that arrangement, the Court defies the Constitution's command that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" Gundy v. United States,

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So the court departed from these "time-honored rules," but what about the law?

Still, things could be worse. Because today's misadventure "sits unmoored from surrounding law," I have reason to hope its approach will not stand the test of time.

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What law? Because I would find actual legal citations a lot firmer foundation for Gorsuch's dissent that the history lesson devoid of legal foundation that he provided.

Conclusion

Once again, we not only see the court placing its previous opinions above the supreme law of the land, we see them re-writing their own "doctrines" to support their preferred outcome.

Held: The universal-service contribution scheme does not

violate the nondelegation doctrine.

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Remember, according to Article I, Section 1 of the Constitution:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Constitution, Article I, Section 1

So only Congress can legislate (make law), but when Congress created the universal service funding scheme, they violated Article I, Section 8, Clause 1 of the Constitution:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;

U.S. Constitution, Article I, Section 8, Clause 1

Ignoring this little problem, as the Court did, we come to the nondelegation problem. While Congress can, and in fact must, have the Executive Branch put into execution their laws, that does not include delegating to the FCC the power to determine tax rates, which is done via legislation.

A law violates the traditional nondelegation doctrine when it authorizes an agency to legislate.

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Furthermore, when the FCC allowed a private entity to determine the rate to be collected, it also violated the nondelegation doctrine.

And a law violates the private nondelegation doctrine when it

allows non-governmental entities to govern.

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This is why decisions of the Supreme Court are not law, much less the supreme law of the land. They are not law because only Congress can make law. Furthermore, the court is not an elected branch of government. Also, they are not the supreme law because that would mean the United States is not a republic, but on oligarchy ruled by nine justices in black robes. And this case shows just how corrupted the federal government has become, ignoring their oaths to support the Constitution, and making up rules to get their way. How can we call ourselves the land of the free if we keep following these oligarchs?

This "universal service" program is simply another bribe from Washington, D.C. Sadly, it seems to be a rather popular one.

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